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No. 86-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,

Appellants,

—v.—

LAPIDUS POPCORN, INC.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA AFTER DENIAL OF REVIEW BY THE SUPREME COURT OF CALIFORNIA

MOTION OF ATLANTIC RICHFIELD COMPANY, EXXON CORPORATION, MOBIL OIL CORPORATION, SHELL OIL COMPANY, TEXACO INC. AND UNION OIL COMPANY OF CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND PROPOSED BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Atlantic Richfield Company, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc. and Union Oil Company of California move pursuant to Supreme Court Rule 42(1) for leave to file a brief as *amici curiae* in support of the jurisdictional statement in this appeal from the decision of the Court of Appeal of the State of California, *Crown Oil Corp. v. Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986). This motion is made necessary by the refusal of appellee to consent to the filing of the appended brief.

The six *amici* are directly interested in this appeal because they are defendants in two massive actions brought under the challenged California statute. *Amici* are defendants in *California v. Standard Oil Company of California, et al.*, No. 76-2839 (C.D. Cal.) (the "*California* case"), one of five coordinated treble-damage actions now pending in the United States District Court for the Central District of California. (The five cases are collectively known as "MDL 150.") These cases were filed by the attorneys general of five states, including California, on behalf of the states and purported classes consisting of tens of millions of indirect retail purchasers. The states' complaints allege, *inter alia*, that defendants conspired to fix the price of gasoline sold at retail. The six *amici* are also defendants in *Retail Clerks Union Local 648 v. Exxon Corp., et al.*, No. 789-489 (Cal. Sup. Ct. San Francisco Cty.) (the "*Retail Clerks*" case), an action in the state court on behalf of a purported class of indirect purchasers asserting substantially the same claims as those asserted in the *California* case.

The five states' federal action against *amici* has led to a straightforward application of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). With exceptions not material here, *amici* do not sell gasoline directly to consumers at retail. Instead, such consumers purchase gasoline indirectly from some thousands of service station dealers. The direct purchaser dealers brought a class action of their own alleging that the defendant manufacturers had imposed collusive restraints that enabled them to extract a wholesale overcharge from the dealers. In that case, under the rule of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the defendants were barred from attempting to prove that the direct purchaser dealers had passed on the alleged overcharges to indirect purchasers. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). After certification of the *Bogosian* direct purchaser class, the six *amici* and their co-defendants settled the case for an aggregate amount of $36 million. *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985).

California and its co-plaintiff states in MDL 150 argued that *Illinois Brick* did not bar federal antitrust claims based on the plaintiffs' indirect purchases because the dealers were "captives" whose direct wholesale purchases did not constitute a "true intermediate market." The district court, rejecting that argument, denied class certification. The court reasoned that putative consumer class members' claims either were barred outright by the rule of *Illinois Brick*, or would require dealer-by-dealer proof that thousands of dealers were "controlled" by their suppliers within the meaning of a purported exception to *Illinois Brick* or were engaged in vertical price-fixing conspiracies with their respective suppliers. The plaintiff states' proposed consumer classes therefore failed to meet the requirement of Fed. R. Civ. P. 23(b)(3) that common issues predominate over individual issues. A unanimous panel of the Ninth Circuit affirmed this decision, and this Court denied certiorari. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 523 F. Supp. 1116 (C.D. Cal. 1981), *aff'd*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984).

These decisions should have laid to rest the indirect purchase claims in the *California* case, but they have not. California, in addition to pleading its claim under federal law, also pleaded a claim based on the same alleged facts under the California antitrust law that is before the Court in this case. California now contends that this pendent claim permits a renewed attempt to certify a class of indirect purchasers. Moreover, shortly after the district court had denied class certification in the *California* case, three union locals commenced the *Retail Clerks* case against the six *amici* and others in the California Superior Court.

The cases involving the six *amici* further demonstrate that this appeal has implications beyond California. Arizona, a co-plaintiff with California in MDL 150, has pleaded a claim under its state antitrust law. Although the Arizona legislature has not amended the Arizona law to permit indirect purchaser suits, Arizona nevertheless contends that the *Illinois Brick* rule

against indirect purchaser claims does not apply in suits under state law.[1] Moreover, the states of Arizona, Oregon, and Washington have moved for leave to intervene in both the *California* case and the *Retail Clerks* case in the state court. Their proposed complaint in intervention seeks to apply California's Cartwright Act to permit claims by indirect purchasers in other states.

The six *amici* seek leave to file their proposed brief to demonstrate both the broad significance of the preemption issue presented by this appeal and to demonstrate that preemption is clearly required. Preemption is required because of the clear conflict between the California statute subjecting firms, including the six *amici*, to the risk of multiple liability for a single antitrust violation and the federal policy against subjecting firms to such a risk.

Dated: September 18, 1986

Respectfully submitted,

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1. Arizona's position illustrates that the issue raised here involves not only the ten states with statutes explicitly allowing indirect purchaser recovery (*see* Jurisdictional Statement at 13 & 13 n.8), but potentially involves some forty states with state antitrust laws permitting private damage actions. *See* 16L & 16M J. Von Kalinowski, *Antitrust Laws and Trade Regulation* (1986).

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Atlantic Richfield Company, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California, as *amici curiae*, respectfully urge that if the Court does not summarily reverse the decision below, *Crown Oil Corp. v. Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986), it should note probable jurisdiction in this appeal and set the case for full briefing and argument on the merits.

INTEREST OF THE *AMICI CURIAE*

As explained more fully in the accompanying Motion, the six *amici* are directly interested in this appeal because they are defendants in cases brought under the challenged California statute on behalf of indirect purchasers.[1] Those actions expose the six *amici* to the risk of millions of dollars of potential duplicative liability.

THE QUESTIONS ARE SUBSTANTIAL

It is familiar doctrine that, even absent express or implied preemption of an entire field of regulation, state laws are preempted to the extent that they actually conflict with federal law or policy. Such a conflict arises when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). All that is required to find preemption is that state law "frustrates the objectives of the [federal] Act in some substantial way." *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982) (White, Burger and Blackmun, JJ.). *See Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (quoting *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942)) ("federal policy 'may not be set at naught, or its benefits denied,' by the state law").[2]

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1. The statute at issue on this appeal is the 1978 amendment to the Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.* (West 1964 & Supp. 1986), quoted in full at Jurisdictional Statement 3-4.

2. The Court has applied this principle repeatedly to hold preempted state laws that conflicted with federal policy. *E.g., Lawrence County v. Lead-Deadwood School District*, 105 S. Ct. 695, 700-03 (1985) (preempting state law governing local governments' disposition of federal payments as conflicting with federal "objective of ensuring local governments the freedom and flexibility to spend money as they saw fit"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704-05 (1984) (preempting a state advertising ban that effectively compelled cable operators to abandon carrying "pay cable" services as conflicting with

(footnote continued on following page)

The California Court of Appeal failed to find that the California statute in this case impermissibly conflicted with federal policy because that court failed to grasp the multiple federal policies established by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).[3] The Court of Appeal concluded that *Illinois Brick* rests upon the single federal policy that judicial economy is best served by eliminating pass-on issues from antitrust trials. Jurisdictional Statement at A-9 & A-9 n.6. The court thereby failed to recognize that *Illinois Brick* also rests upon a federal policy against subjecting a firm to the risk of mutiple liability for a single antitrust violation.[4] Indeed, *Illinois Brick* barred indirect purchaser suits because the majority in that case believed that such a bar is the only foolproof way to prevent multiple liability. 431 U.S. at 730-31 & n.11. It is this federal policy with which the California statute is in direct conflict. That conflict requires preemption here.

(footnote continued from previous page)

federal policy favoring such carriage); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 155-56 (1982) (preempting state law prohibiting "due on sale" clauses in real estate mortgages as conflicting with federal policy of affording savings and loan associations the flexibility to include such clauses); *McCarty v. McCarty*, 453 U.S. 210, 232-35 (1981) (preempting state community property law as conflicting with federal policy that military retirement pay shall be treated as the retiree's personal entitlement).

3. The Court of Appeals also expressed distaste for the result in *Illinois Brick*, stating that this Court's decision had frustrated Congressional intent. Jurisdictional Statement at A-9 & A-9 n.6.

4. In the Court of Appeal's view, exposing defendants to multiple liability in suits by direct and indirect purchasers was merely something that *Illinois Brick* would avoid if possible but does not forbid outright, so that state law indirect purchaser actions are not preempted merely because they may impose multiple liability. Jurisdictional Statement at A-6. (stating that the *Illinois Brick* Court was "troubled by" and "frowned upon" multiple liability).

I.

IT IS FEDERAL ANTITRUST POLICY THAT FIRMS SHALL NOT BE SUBJECT TO THE RISK OF MULTIPLE TREBLE DAMAGES FOR A SINGLE VIOLATION

The California Court of Appeal's failure to recognize the federal policy against multiple liability apparently resulted from its failure to appreciate that the Court's opinion in *Illinois Brick* dealt with two fundamental questions. First, the Court considered whether to permit the inconsistent application of pass-on theories. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487-94 (1968), had held that the direct purchaser was entitled to recover the full amount of the overcharge that he paid and that the defendant could not seek to diminish that recovery by attempting to prove that the direct purchaser passed the overcharge on to indirect purchasers. The threshold issue for the *Illinois Brick* Court was whether it should permit indirect purchasers to recover the portion of the overcharge that is passed on while retaining the *Hanover Shoe* rule precluding a pass-on defense in suits by direct purchasers. The Court rejected that option. Such inconsistent application of pass-on theories would expose defendants to a risk of multiple liability that the Court expressly found to be unacceptable. 431 U.S. at 730-731 & 731 n.11. Second, after having concluded that pass-on rules should be applied consistently, the Court considered whether it should retain the *Hanover Shoe* rule against defensive proof of pass-on. The Court concluded that *Hanover Shoe* had been correctly decided and should not be overruled. Accordingly, the Court held that an indirect purchaser may not recover the portion of the illegal overcharge allegedly passed on to him.

The *Illinois Brick* Court's holding that pass-on theories may not be used inconsistently in suits by direct and indirect purchasers rested upon, and clearly expressed, a federal antitrust policy against exposing defendants to the risk of multiple liability. The Court's opinion states that multiple liability

would be "unwarranted," 431 U.S. at 730, and "not *** acceptable," 431 U.S. at 731 n.11. The Court cited *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972), which rejected *parens patriae* antitrust suits for injury to a state's "general economy" on the ground, *inter alia*, that any damages awarded to the state for such injury would duplicate damages recoverable by other plaintiffs. 431 U.S. at 731.

The *Illinois Brick* majority and dissenting opinions agreed that multiple liability should not be imposed. They differed only on whether the policy against multiple liability required preclusion of indirect purchaser suits. The three dissenting Justices found that procedural mechanisms such as consolidation and statutory interpleader would prevent multiple liability in most cases. The dissenting opinion acknowledged that such devices might not always prevent multiple liability, but found on policy grounds that "the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not *** justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery." 431 U.S. at 761 (Brennan, J., dissenting). The majority, however, disagreed. After noting the available procedural options the Court concluded that there would always be some cases in which such procedural devices would not prevent multiple liability. The Court concluded that advocates of indirect purchaser suits "ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. ****We do not find this risk acceptable.*" 431 U.S. at 731 n.11 (citations and quotations omitted; emphasis added).

Other opinions of the Court have articulated this federal policy against the risk of multiple liability for a single antitrust violation. As noted above, *Hawaii v. Standard Oil Co. of California* had announced the policy prior to *Illinois Brick*. And since *Illinois Brick* the Court has adverted to the policy repeatedly. In 1979 the Court stated that "[a] central premise of our holding in *Hawaii* was concern over duplicative recov-

eries." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). In 1982, the Court noted that *Illinois Brick* had "found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474 (1982). The Court also stated that both *Hawaii* and *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws."[5] *Id.* at 474-75. And in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court referred to "the policy against duplicative recoveries", *id.* at 545 n.52, and held that the plaintiff union lacked antitrust standing, because, *inter alia*, its claimed injuries might duplicate those of other potential plaintiffs. *Id.* at 543-46. Justice Marshall's dissenting opinion, while disagreeing that the recovery sought by that plaintiff would have been duplicative on the facts, expressly acknowledged the federal policy forbidding multiple liability:

> "Nor does the present case implicate the consideration of statutory policy underlying this Court's decisions in *Illinois Brick Co. v. Illinois* *** and *Hawaii v. Standard Oil Co.* *** Critical to the denial of standing in those cases was the risk of duplicative recovery that would have been created by affording the plaintiffs standing."

Id. at 549-50 (Marshall, J., dissenting) (citations and footnotes omitted). Then, after describing the holdings of *Hanover Shoe* and *Illinois Brick*, Justice Marshall added this explanatory footnote:

> "Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii*

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5. *McCready* states that *Illinois Brick's* concern over judicial economy, which the Court of Appeal in this case characterized as *Illinois Brick's* principal rationale, Jurisdictional Statement at A-9 & A-9 n.6, was in fact only a "subordinate theme." *McCready* at 475 n.11.

> *v. Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. *Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated.* See 2 P. Areeda & D. Turner, Antitrust Law § 337d (1978)."

Id. at 550 n.7 (Marshall, J., dissenting) (emphasis added).

The Court's concern over double recovery is well founded. The availability of treble damages and attorneys' fees makes the antitrust damage action one of the most potent weapons that a private plaintiff can wield. It is not without its potential for abuse. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). A judicial construction—or, as in this case, a state statute—permitting double recovery turns the action into one for "sextuple damages" and can only exacerbate that potential for abuse.[6]

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6. One lower court, in rejecting "umbrella" claims by plaintiffs who dealt with non-conspiring competitors of an alleged antitrust violator, noted that imposing excessive liability on antitrust defendants can harm competition:

> "Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits ***. Notwithstanding the seriousness of the *per se* violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws. In this regard, it should be noted that Congress has enacted relatively stiff criminal penalties to punish those who flout the antitrust laws, that the Supreme Court has been especially reticent in sanctioning multiple treble damage recoveries for the same injury, and that other courts have been wary of permitting overkill recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition."

Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 586-87 (3d Cir. 1979) (footnotes omitted).

II.

THE CALIFORNIA INDIRECT PURCHASER STATUTE CONFLICTS WITH THIS FEDERAL POLICY

The California statute permitting suits by indirect purchasers conflicts with the federal policy against multiple liability in every case involving direct and indirect purchasers that is subject to concurrent federal and state antitrust jurisdiction.[7] Under *Hanover Shoe* the direct purchaser can recover in federal court the full amount of the overcharge even where the defendant or an indirect purchaser could prove that some or all of the overcharge was passed on. As a result, any amount recovered by indirect purchasers under California law (which depending on the facts could be the entire overcharge, or even several times the amount of the overcharge if successive levels of indirect purchasers bring suit), will by definition represent multiple liability.

Moreover, the California courts have exacerbated the risk of multiple liability by rejecting the only measure that even theoretically could have avoided the risk—requiring the direct purchaser to be joined as a defendant in the indirect purchaser's suit. In such a case, the direct purchaser could be forced to pursue a state antitrust law claim in which he could recover only the amount not passed on. The court could adjudicate both the amount of the unlawful overcharge that the direct purchaser paid and the amount that was passed on to each succeeding indirect purchaser. Both direct and indirect purchasers would be bound by the resulting judgment, which

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7. California's law permitting indirect purchasers to sue is not in conflict with federal law insofar as it is applied in cases based on wholly intrastate commerce not subject to the federal antitrust laws. But this is not such a case: a class of direct purchasers sued and recovered under the federal antitrust laws for the same alleged violations. Jurisdictional Statement at 5-6. A similar result occurred in the cases involving the six *amici*. *See* accompanying Motion p.2.

would limit the defendant's liability, as federal policy requires, to three times the amount of the original overcharge.[8]

However, the California Supreme Court has rejected this approach. In *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 22-24, 201 Cal. Rptr. 580, 584-86, 679 P.2d 14, 18-20 (1984), the California Supreme Court held that direct purchasers are not indispensable parties who must be joined in indirect purchaser suits in order to prevent the risk of multiple liability.[9] The court found (over a vigorous dissent) that the risk of multiple liability was not substantial.

Union Carbide's finding that the risk of multiple liability did not require joinder of direct purchasers is unsound. The court concluded that defendants are not exposed to multiple liability

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8. In an analogous context, lower federal courts have held that where an indirect purchaser sues on the theory that the direct purchaser was a participant in a vertical price-fixing conspiracy (rather than on a pass-on theory directly controlled by *Illinois Brick*), the federal policy against duplicative recovery requires that the direct purchaser be joined in the action and bound by its result. If the direct purchaser were not joined in such a case, double recovery could occur if he later sued for the full overcharge that he paid, while defending any claim that he participated in a vertical conspiracy and relying on *Hanover Shoe* to bar any pass-on defense. *See Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 931-32 (3d Cir. 1986); *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528, 529-32 (8th Cir.), *cert. denied*, 105 S. Ct. 306 (1984); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *see also Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 977 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981).

9. While the *Union Carbide* court left open the possibility that *intermediate* purchasers down the chain of distribution from the direct purchasers might be indispensable parties on a proper factual record, 36 Cal. 3d at 23-24, 201 Cal. Rptr. at 585-86, 679 P.2d at 19-20, it definitively held that the *direct* purchaser's ability to recover the entire overcharge under *Hanover Shoe* did not make him indispensable to the indirect purchaser's state antitrust lawsuit. 36 Cal. 3d at 22-23, 201 Cal. Rptr. at 584-85, 679 P.2d at 18-19.

so long as they are paying damages to different plaintiffs (i.e., direct purchasers in federal court and indirect purchasers in state court) for the same tortious conduct. 36 Cal. 3d at 22-23, 201 Cal. Rptr. at 584-85, 679 P.2d at 18-19. That is obviously false in a case such as *Union Carbide* where both the direct and indirect purchasers sued based on the same alleged price-fixing. 36 Cal. 3d at 20, 201 Cal. Rptr. at 583, 679 P.2d at 17. The only tortious conduct committed by a defendant in such a case is the extraction of a wholesale overcharge from the direct purchaser. *Hanover Shoe* requires the defendant to pay that full overcharge, trebled, to the direct purchaser under federal law. Any amounts paid in such a case under state law to indirect purchasers (who by definition are not victims of some separate tort by the defendant because the defendant never dealt with them) represents multiple liability.

Union Carbide's conclusion that the California legislature has adopted the views of the *Illinois Brick* dissenting opinion overlooks the statements in that dissenting opinion disapproving of multiple liability and recommending that indirect purchaser suits be accompanied by appropriate procedural mechanisms to prevent it. 36 Cal. 3d at 20, 24, 201 Cal. Rptr. at 582, 585, 679 P.2d at 16-17, 19. By rejecting such a procedural mechanism, *Union Carbide* ensured that California law will impose multiple liability that not even the dissenting opinion in *Illinois Brick* advocated.[10]

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10. Even if the California Supreme Court had decided *Union Carbide* differently, California's indirect purchaser law would still conflict with federal policy, because this Court concluded in *Illinois Brick* that efforts to bring direct and indirect purchasers together in one action, while desirable in theory, would not adequately protect against the risk of multiple liability that indirect purchaser suits would present. 431 U.S. at 731 n.11, 737 n.18.

III.

THE CONFLICT BETWEEN STATE LAW AND FEDERAL POLICY REQUIRES PREEMPTION

The state law at issue on this appeal clearly conflicts with federal policy because the state law creates the very risk of multiple liability that the *Illinois Brick* majority found "unwarranted" and "not acceptable." This conflict is all that is required for preemption under the Court's opinions cited at p. 2 and n.2, *supra*. Indeed, the Court previously has held preempted state antitrust laws where their application "would conflict with federal policy." *Flood v. Kuhn*, 407 U.S. 258, 284 (1972). The Court's principal decision in *Flood* was to adhere to its prior decisions holding professional baseball exempt from the federal antitrust laws. But that holding did not dispose of Flood's attempt to fill the vacuum by applying state antitrust law to baseball. The Court held that the statements by the lower courts, including the trial court's statement that state antitrust regulation would conflict with federal policy, "adequately disposed of" Flood's attempt to apply state antitrust laws to baseball, and thereby held that state antitrust laws could not be so used where such use would conflict with federal policy.[11] Similarly, the California statute cannot be used

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11. The *Flood* district court initially ruled that federal antitrust laws preempted purported state law antitrust regulation of baseball and also that application of state antitrust laws to that sport would impermissibly burden interstate commerce. *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972). It reasoned that state antitrust laws could not regulate baseball when federal policy exempted baseball from antitrust regulation. It described the conflict as follows:

> "Enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball."

316 F. Supp. at 279. The Second Circuit, relying entirely on Commerce Clause grounds, affirmed. 443 F.2d at 266-68. As indicated by the language quoted in the text, the Supreme Court rested its decision on both preemption and Commerce Clause grounds.

to fill a vacuum created by the Court's *Illinois Brick* decision where that use would conflict with federal policy, as articulated by this Court.

In the present case the California Court of Appeal, apart from its failure to discern the clear federal policy against multiple liability articulated in *Illinois Brick*, offered two arguments as to why California's law is not in conflict with federal law. Neither argument can withstand analysis. First, the court analogized California's indirect purchaser statute to the state remedies that were held not preempted in the *Silkwood* and *Hayfield* cases because they were cumulative of federal remedies, but not in conflict with any federal policy.[12] Jurisdictional Statement at A7-8 & A8 n.5. That analogy is incorrect because this Court in *Illinois Brick* was not indifferent on the issue of whether further antitrust liability could be imposed on defendants already liable under *Hanover Shoe* for the full overcharge in suits by the direct purchasers. Rather, this Court held that federal policy required that defendants not be exposed to the risk of such multiple liability. *See* pp. 4-6 above.

Second, the Court of Appeal tried to obfuscate the multiple liability that inevitably must occur if the plaintiffs recover damages in this case by suggesting that the prior direct purchaser action did not result in liability because it was termi-

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12. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), held that an award of punitive damages under state law in a tort action arising from the alleged unsafe operation of a federally licensed plutonium plant was not in conflict with, and hence not preempted by, the federal statutes and regulations, enforceable by fines, that governed the plant's operation. *Hayfield Northern Railroad v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), held that the provisions of the Staggers Rail Act permitting a carrier to abandon a rail line after providing shippers with an opportunity to subsidize or purchase the line did not preempt a proceeding under state law in which a shipper sought to condemn the line after the carrier had abandoned it. The Court found that, because the state condemnation followed the abandonment of the line, the railroad was not deprived of the opportunity for prompt abandonment which was all that the federal statute had been designed to achieve.

nated by settlement. Jurisdictional Statement at A-10. That is sophistry. The defendants in this case paid the class of all direct purchasers consideration amounting to $12 million to settle their claims for alleged unlawful overcharges. Jurisdictional Statement at A-2 n.2. In settling the case both sides presumably were guided by the knowledge that *Hanover Shoe* would bar any pass-on defense at trial. Thus, for analytical purposes the defendants have paid the entire overcharge because they have settled a litigation in which the entire overcharge was at stake. Indeed, *Illinois Brick* notes that any recovery by an indirect purchaser after the defendant has settled with the direct purchaser would be duplicative recovery. 431 U.S. at 731 n.11.

CONCLUSION

If the decision of the California Court of Appeal is not summarily reversed, the Court should note probable jurisdiction and set this case for full briefing and argument on the merits.

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